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*Published in:*  
Scots Law Times

*Publication date:*  
2017

*Document Version*  
Author accepted manuscript

[Link to publication in ResearchOnline](#)

*Citation for published version (Harvard):*  
Russell, EJ 2017, 'Weak parapets: protecting the travelling public', *Scots Law Times*, pp. 113-123.

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## **Weak parapets: Protecting the travelling public**

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*The author considers the recent decision in Bowes v The Highland Council [2017] CSOH 53 which provides a cautionary tale for any roads authority which might be tempted to disregard safety advice given by technical experts.*

### **Introduction**

While it is well known that roads authorities have competing demands on their limited budgets, failure to address known hazards may have devastating consequences for members of the travelling public and may result in the imposition of liability. The recent case of *Bowes v The Highland Council* is one such example. The opinion of Lord Mulholland provides a welcome overview of case law in this area and clarifies what is required for a successful claim in Scotland.

### **Background to the case**

The circumstances of the case are tragic. On a February morning in 2010, David Bowes was driving his pickup truck across the Kyle of Tongue bridge. He was alone in the vehicle. The weather was poor with squalls of snow showers and the road was covered with snow and slush. Mr Bowes' vehicle crossed from the westbound to the eastbound lane, mounted the kerb on the north side of the bridge, collided with the parapet and fell into the water. Sadly, Mr Bowes was unable to escape from the vehicle and drowned. The bridge was owned by the Highland Council which had responsibility for managing and maintaining the bridge and its parapets. Several members of the deceased's family sought damages from the council on the basis that the accident was caused by its failure at common law to take reasonable care for the safety of Mr Bowes whilst crossing the bridge.

### **Proof on liability**

The case came before Lord Mulholland for proof on liability. At the proof, the pursuers led evidence from several witnesses, including Les Christie, the defender's engineer who had produced a report on the bridge in 2005, John Webb, a civil engineer who co-authored a report on the bridge in 2008, Dr John Searle, a chartered engineer who produced an expert report and Ian Hunt, a bridge engineer who also produced an expert report. The defender led evidence from Ian Moncrieff, David MacKenzie, and Donald Louttit, all engineers with Highland Council, Mark Littler, a Forensic Collision Investigator and William Day, a Chartered Civil Engineer.

The single lane carriageways of the Kyle of Tongue bridge are relatively narrow and the road, which is straight, is bordered by a raised footway on both sides. Although the bridge is not heavily trafficked, it is an essential link for the local community. It is used by school and tourist buses, delivery lorries, a summer bus service between Inverness and Durness and emergency service vehicles. If the bridge was closed, depending on the size of the vehicle, a detour of around one hundred miles would be required.

There were no witnesses to Mr Bowes' accident and what happened had to be pieced together inferentially from the available evidence. The deceased's vehicle

collided with the parapet between stanchions 8 and 9 on the left hand side. It appeared that the parapet had not behaved as it should have done, namely to act as an elastic band and redirect Mr Bowes' errant vehicle back into the carriageway. Instead, the 12 west most stanchions and railings on the north side of the parapet broke off at the welds over a distance of about 38 metres and swung out from the bridge. Stanchions 13 and 14 fractured but remained attached. Dr Searle described this phenomenon as an "unzipping" of this section of the parapet. The aluminium parapet had failed due to cracked post based castings and post/base casting welds. The vehicle's airbags (which were working) had not been activated and the evidence indicated that they would have been expected to deploy if the parapet had been operating properly.

There was no evidence that the deceased's loss of control was caused by mechanical failure or by any medical condition nor was there any evidence that the carriageway surface was responsible. Witnesses who were quickly at the locus spoke to seeing tyre tracks in the slush which ended where the deceased's vehicle collided with the parapet. Assembling all the evidence, Lord Mulholland held that the deceased lost control of his vehicle and it gradually, at a shallow angle, veered across the carriageway without any discernible attempts to correct the loss of control, mounted the pavement and collided with the parapet. This occurred on a long straight stretch of road. As there was no non-negligent explanation for the loss of control, the Lord Ordinary held that it resulted from the fault of the deceased and not from any failure of the defender. There was some evidential base however to hold that the deceased would not have been exceeding the speed limit. The habitually cautious nature of his driving was spoken to by his partner and employees. His speed would have been significantly lower than the 60mph speed limit given the weather conditions, the fact that the airbags were not activated, and the limited impact damage to the parapet railings. The Lord Ordinary accepted a speed range of between 20 – 40 mph. Given the narrowness of the road, the weather conditions and the shallow angled tyre tracks, the angle of impact would have been 15 degrees or less.

The parapet was erected on both sides of the Kyle of Tongue bridge when it was built in 1971. The parapet consisted of aluminium posts (or stanchions) welded to aluminium base plates. The base plates were anchored to the bridge by four bolts and three horizontal aluminium rails were bolted to the posts. The parapet was designed to contain vehicles weighing up to 1.5 tonnes, travelling at 50 mph and hitting the parapet at an angle of 20 degrees. On the day of the accident the weight, speed and angle of impact of Mr Bowes' vehicle were well within the design capacity of the parapet. Lord Mulholland therefore concluded that, had the parapet been acting to its design capacity, the deceased's vehicle would have been contained by the parapet and would not have left the bridge. Accordingly, the deceased would not have drowned. At worst, given the absence of any other traffic at the relevant time, Mr Bowes would have sustained only minor injury.

As far as inspection of the bridge (and its parapets) was concerned, the defender's system involved a general inspection every three years and a principal inspection every nine years. The general inspections were visual in nature whereas the principal inspections utilised specialist access (including divers). In July 2005, a principal inspection was carried out by Les Christie. He was the engineer who had responsibility for the bridge at that time. He prepared a report which highlighted certain defects on the bridge. Major structural elements were continuing to deteriorate. With regard to the parapets, a numbering system for the 58 posts on

either side was used. On the left-hand side (from which the deceased fell) defects were found on post to base welds numbers 14, 43, 53, and 56. A cracked base casting was detected at 13 and there was a deflection in the rail between posts 24 - 36. Further defects were found on the right-hand side. In his report, Mr Christie, who was aware of the constraints on the defender's budget, recommended that major repairs to the structure should be carried out without delay and in respect of the parapet within the next financial year. While the defects to the bridge itself were categorised as minor or unacceptable, the defects to the parapet were categorised as "severe." Mr Christie gave this rating as he was concerned about safety.

Mr Christie recommended in his report that: (1) the design and implementation of repair works should proceed in the next financial year (2) general inspections should monitor the structure condition if repairs were delayed (3) the bridge parapet condition should be checked twice yearly to monitor deterioration, until parapet replacement was carried out, and (4) a special inspection of the steel work piling protective system should be carried out. The overall cost of the work was estimated at £1,544,000. That figure included the work to replace the parapets, which was estimated at £150,000.

In evidence, Mr Christie expressed his concern that if one or two posts failed, the parapet might not act as it should in the event of being struck by a vehicle. He was not confident that the parapet had the capacity to restrain vehicles within its own design capacity. He recommended repairs should be carried out as a matter of urgency, both in relation to safety and costs, which were going to accelerate.

Although no proposal for interim measures was contained within his written report, Mr Christie verbally recommended to his boss, Mr Louttit, in August 2005, that interim measures be put in place pending replacement of the parapet. The interim measures proposed were a temporary barrier, the introduction of traffic lights, reduction to single lane passage, and a reduction in the speed limit to 30 mph.

Mr Louttit rejected these proposals. He took the view that a reduced speed limit was pointless as it would not be observed. He did not consider temporary measures to be necessary or appropriate due to the light traffic on the bridge, good visibility, straight road, the absence of an accident history, and the fact that the bridge structure would not be compromised by a collision with a parapet. Mr Louttit did however agree with Mr Christie's recommendation (stated in his report) of twice yearly monitoring of the bridge and parapets. Such monitoring was duly introduced.

Further inspections were carried out in February, June and December 2006, September 2007 and January 2008. Although no defects were detected in the section of parapet which failed, new defects were detected in other sections on all but one inspection. The defects detected (cracks and corrosion) were sufficiently serious to affect adversely the containment strength of the parapet. The inspections only picked up defects which could be detected visually. Defective welds would be unlikely to be detected on a visual examination and if the welds of the box section to the base plate were not continuous, water ingress and corrosion could occur. A Metals Consultant conducted a metallurgical examination of three posts (numbers 9, 10 and 11) and base plates after the accident. Although those three posts had not featured as defects in the inspection reports, the consultant's report stated that the weld profiles were irregular and evidence of lack of root penetration and fusion was noted in the welds at the front. Porosity was also noted in areas in the welds and corrosion was observed in the base plates. He considered that the general quality of welding was poor and would not meet approval to the relevant standards of welding.

After the January 2008 inspection, the defenders ceased monitoring the parapet. This decision was taken by Ian Moncrieff, who was principal Engineer responsible for bridges in the Caithness area in 2008. He had taken over responsibility for the bridge from Les Christie. Mr Moncrieff's explanation for discontinuing the biannual inspections was that the number of new defects had dropped to zero in percentage terms, the prospectus for repair was due to be issued and at some point in the future, possibly one or more years, major works would be carried out to the bridge. Donald Louttit, Principal Engineer for structures at Highland Council was unaware of the decision to discontinue the inspections and was surprised when he learned of it. He would have continued the monitoring. As was made clear in the Highland Council Bridge Maintenance programme Sutherland for 2005 – 2015 dated 3 October 2005, the bridge parapet was failing and should be replaced on public safety grounds as soon as possible. This was not done prior to the accident and biannual monitoring was instituted instead (but, as noted above, was subsequently discontinued). In 2008 the defender had commissioned a report on the bridge and parapet from Faber Maunsell, Consultant Engineers. The report noted that the parapet did not comply with current standards for restraint and was classified as low containment against current standards. The report noted that the containment level was unclear. In evidence, Mr Moncrieff had a limited recollection of the Christie report and could not remember looking at the Faber Maunsell report when the decision was taken to discontinue the biannual inspections.

Having described the decision to discontinue monitoring as "inexplicable" (at para.20), Lord Mulholland stated (at para.22):

"In my opinion the decision to discontinue monitoring was wrong, did not make sense, was against previous advice and, in relation to a matter clearly related to safety, meant that the defender had no idea of the containment strength of the parapet, if any, whether it was continuing to deteriorate, to what extent and rate it was deteriorating, and what measures, if any, should be taken to deal with the problem. The decision was taken in the face of the warnings given by Les Christie, the engineer in charge of the bridge who carried out the Principal Inspection in 2005. The effect of the decision was that the defender was blind to the state and containment capacity of the parapet from 2008 and was not in an informed position to consider what safety and interim measures should be taken in relation to the parapet. It was essential that the decisions on the parapet should be kept under review and revisited in light of the state of the parapet going forward."

Moreover, given that the consequences of a defective parapet with little or no restraint capacity could lead to the death of a member of the public, Lord Mulholland found it "surprising and alarming" (at para.23) that no risk assessment had been carried out in relation to the parapet prior to the accident. Although a post accident risk assessment produced a figure which did not justify upgrading the parapet, Lord Mulholland was highly critical of its methodology and declined to place any weight upon it.

His Lordship went on to observe (at para.23):

"The bridge is essential for remote communities over which school buses and emergency services travel. The safety of these communities is as important as the safety of communities in the busy conurbations of the central belt and, as the defender recognised after the accident, engineering judgment required there to be a functioning parapet. It is therefore clear to me on the evidence that the pursuers have established that immediately prior to the accident the defender knew that (1) the parapet was not compliant with current standards, (2) it was defective, (3) its



containment capacity was compromised to an extent which was unknown, (4) it would not operate as intended, and as a result a motorist who lost control of a vehicle and collided with the parapet could go off the bridge into the water below with a risk to life, and (5) had the parapet ...been operating as designed it would have contained the vehicle on the bridge carriageway and the deceased would not have lost his life.”

### **Legal arguments**

The pursuers did not contend that the defender was obliged to *replace* the parapet prior to the accident but instead contended that interim measures should have been introduced or alternatively that the bridge should have been closed. The interim measures contended for included a temporary barrier, a reduction in the speed limit to 30 mph, temporary traffic lights and consequential single lane carriage and warning signs.

The defender, on the other hand, contended that no duty of care was owed to the deceased. Thus, there was no obligation on the defender to provide a parapet of any strength, and therefore no requirement to put in place temporary measures pending replacement of the defective parapet. Given the low risk of an accident arising out of the condition of the parapet, the defender asserted that temporary measures were unnecessary given their cost, limited utility and the other risks created by such measures.

Lord Mulholland had little difficulty in rejecting the defender’s argument, doing so after a careful analysis of existing case law. First, he examined the relevant statutory context. His Lordship noted that in terms of section 1(1) of the Roads (Scotland) Act 1984, the defender was the roads authority responsible for managing and maintaining the road (which included the bridge and its parapets). Section 28 of the Act provides that the roads authority may, for the purpose of safeguarding persons using a public road, provide and maintain barriers along the sides of bridges, embankments or other dangerous parts of the road. It was clear to Lord Mulholland from the use of the word “safeguarding” that the legislature considered that the provision and maintenance of parapets was for the safety of road users. The inclusion of the word “maintain” indicated the importance that Parliament attached to a functional parapet. Lord Mulholland observed that sections 1 and 28 did not impose a *duty* on a roads authority in relation to persons using the road but simply provided the *power* to do the things specified therein.

Lord Mulholland observed that the erection of parapets as an integral part of a bridge was consistent with a Ministry of Transport Technical Memorandum from 1967 which laid out minimum standards. He continued (at para.25):

“If a bridge over water, carrying vehicular traffic, was built today without a parapet then I would venture to suggest that there would be a public outcry to add to a reluctance to use the bridge. A parapet gives comfort to bridge users that there is a safety measure which helps prevent vehicles from leaving the bridge...I have no doubt that if the majority of drivers knew that the parapets on the Kyle of Tongue bridge were defective, to the extent that they may have little or no containment capacity at all, steps would be taken to avoid the hazard or moderate their driving significantly to take account of the hazard.”

The issue of whether a parapet could be a hazard was considered in *Great North Eastern Railway Ltd v Hart and others* [2003] EWHC 2450 which arose from the Selby Rail disaster. The defendant fell asleep at the wheel of his car which then veered off a motorway and landed on a railway line in the path of a high speed train. The train was derailed and was then struck by a freight train. Ten people died and over seventy were injured. The defendant's insurers sought a contribution from the Secretary of State for Transport for negligence in failing to erect a sufficiently long safety fence. Mr Justice Moreland stated (at para.44):

“Hypothetically there could be cases where a vehicle left the highway and caused damage without any fault on the part of the driver the effective cause being for example a dangerous mal-alignment of the carriageway or dangerously insubstantial bridge parapets or approach safety fencing. If such dangers were created by the Highway Authority, in such a situation there is no reason of policy why the law should not impose a duty of care on the Highway Authority not only to users of the highway but also to those who are or whose property is on neighbouring land.”

In *Sargent v Secretary of State for Scotland* 2000 Rep LR 118, a driver swerved to avoid a bus which had crossed in front of his vehicle at a narrow point in a road. His vehicle left the road and dropped 20 feet into a loch and the driver was killed. Although there was a wall between the road and the loch, it was not designed to prevent vehicles leaving the road and there was a gap where the wall had degraded. In an action against the Secretary of State, the deceased's family argued that the accident was reasonably foreseeable and that there should have been a sign warning of the hazard of buses, a solid barrier, and traffic lights. Lord Clarke held that the lack of a restraining structure such as an Armco barrier or properly maintained wall at the locus was a serious hazard, meaning that “a vehicle leaving the road would inevitably plunge into the loch, with potentially fatal consequences.” (at para.17)

Lord Mulholland proceeded to examine “a long tract of authority requiring Roads Authorities to exercise reasonable care in their management of the roads” (at para.26). In *Innes v Magistrates of Edinburgh, and the Trustees for rebuilding the University of that City* (1798) Mor 13189, Lord Eskgrove stated (at p.13190) that “[o]ne of their most important duties ... is to take care that the streets of the city are kept in such a state as to prevent the slightest danger to passengers.” There, a member of the public broke his thighbone when he fell into a 15 foot pit in the road.

In *McFee and others v Police Commissioners of Broughty-Ferry* (1890) 17 R 764, a cab driver was killed when his head struck a low iron bridge. The Lord Justice Clerk (Kingsburgh) stated (at p.767) that “[w]e must negative the proposition that the Commissioners are entitled to leave a road in a dangerous state, and do nothing for the safety of the public using it.”

In *Fraser v Glasgow Corporation* 1972 SC 162, an eight year old child dropped a lighted paper into the petrol tank of an abandoned car and was injured in the ensuing explosion. Lord Milligan stated (at p.174):

“[A] local authority which has control of a public street may in certain circumstances have an obligation to take steps to see that there does not exist in a public street something which may cause injury to persons frequenting that street ... the danger need not necessarily be one arising out of the physical

condition of the street or pavement... The hazards referred to in most of the reported cases were holes in the ground or defects in the pavement, but in my opinion an object in the street may equally be a hazard. Should such a hazard exist, a local authority, if it is aware of the hazard, is not entitled to do nothing. It is bound to take all reasonable steps in its power to have that hazard removed."

In *McKnight v Clydeside Buses Ltd* 1999 SLT 1167 a child who had been seated upstairs in a double decker bus was killed when the bus collided with a railway bridge. Her parents sought damages from the bus company which in turn sought relief from the relevant roads authority. Lady Cosgrove (at p.1172) stated:

"The duty of a roads authority towards road users is to take reasonable care in all the circumstances (*Smith v Middleton*, per Lord President Emslie at 1971 SLT (Notes), p 66)... that duty encompasses an obligation on the roads authority arising out of their ownership of and responsibility for the road to remedy a dangerous situation of the type which the first defenders offer to prove was known to exist at the time of the accident... I reject the contention ...that any duty on the roads authority is restricted to taking care with regard only to the actual road surface. In my view, a highways authority is under a similar duty of care in respect of road signs placed above the road surface over which it has control in terms of the Road Traffic Regulation Act 1984... What the instant case is concerned with are signs which it is averred have given rise to a situation of manifest danger to road users. In such a situation I consider that a roads authority is under a duty to take steps to remedy the obvious hazard which is known to exist: it cannot ignore its duty to act in the interests of public safety. Further, it matters not in my view whether the defect arises from the original erection of the sign or as a result of it having become faded (as is alleged in respect of the chevrons on the bridge). In *Laing* the Lord Justice Clerk (at p 201 (p439) made it clear that the danger which the owner of the pavement was bound to have removed included danger arising both from faulty construction and by decay from age."

*Gibson v Orr* 1999 SC 420 concerned the liability of Strathclyde Police for failing to warn motorists about the collapse of a bridge over which a public road ran. Police officers placed cones on the north side of the river but left the scene without erecting any barrier or warning on the south side. A car was driven on to the bridge and fell into the river, resulting in the death of all of the car's occupants except for the pursuer. It was held that a duty of care was owed by the police to the pursuer. The court drew an analogy with roads authorities. Lord Hamilton stated (at p.435):

"The functions...of roads authorities in respect of the management and maintenance of public roads are laid down, commonly by statute, in similar 'public' terms...it has never, so far as I am aware, been doubted in Scotland that as regards operational matters a duty of care is owed by such authorities and their servants to road users — a duty not directly under the statute but a duty arising out of the relationship between those authorities and road users created by the control vested by statute in the former over the public roads in their charge"

Lord Mulholland then turned his attention to the Inner House authority of *MacDonald v Aberdeenshire Council* 2014 SC 114. There, a collision occurred at the crossroads of a public road. In subsequent proceedings against the roads authority, it was



averred that there was no sign giving sufficient advance warning of the presence of the junction. The common law case averred that the defenders had created a danger to road users and had failed to take reasonable care to devise, institute and maintain a reasonable system of installation, inspection and repair of the road markings and signage at the junction. Lady Paton in considering whether the roads authority owed a duty of care, stated (at para.36):

“if a section of a country road were to collapse, leaving a large crater or sinkhole, and if that hazard was drawn to the attention of the roads authority, Scots law would, in my opinion, impose upon the roads authority a common law duty of care owed to users of that country road. That consequence would be in keeping with Scots common law as it has developed ...and would follow from the application of tests such as reasonable foreseeability of harm, proximity of relationship, and what would be fair, just and reasonable.”

Lady Paton noted that, in contrast to the English Law of tort, Scots Law draws no distinction between acts and omissions. The existence of a duty of care depended upon the particular facts of each case. Although the relationship between drivers using the crossroads and the authority was sufficiently proximate to give rise to the imposition of a duty of care, Lady Paton considered that it was not reasonably foreseeable that an accident was likely to occur at the junction. The pleadings indicated that the wearing away of the painted lines was a gradual process and there were no averments that the roads authority had been placed on notice that the lines were fading and constituted a hazard. Lady Paton considered that it would not be fair, just and reasonable to impose a duty of care on the defenders as the situation at the crossroads did not (prior to the accident) present as a high priority situation with obvious danger demanding prompt attention from the roads authority. Her Ladyship stated (at para.43):

“...in the circumstances of this particular case...the only duty owed by the defenders was of a public, general nature, namely to repaint the lines in the course of their routine rolling programme of repair and maintenance in the exercise of their statutory powers, and on the basis of a timetable fixed by them (using their judgment and discretion, the guidance given in local authority manuals and codes, and affording certain matters priority over others).”

However, Lady Paton also considered that as soon as placed on notice, the accident having occurred, the defenders’ duties and prioritisation of tasks might change.

Lord Drummond Young in *MacDonald* summarised the current state of Scots Law (at paras.63-64):

“A roads authority is liable in negligence at common law for any failure to deal with a hazard that exists on the roads under its control. A ‘hazard’ for this purpose is something that would present a significant risk of an accident to a person proceeding along the road in question with due skill and care...This means that, for a roads authority to be liable to a person who suffers injury because of the state of a road under their charge, two features must exist. First, the injury must be caused by a hazard, the sort of danger that would create a significant risk of an accident to a careful road user. Secondly, the authority must be at fault in failing to deal with the hazard. This means that the pursuer must establish that a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to correct it,

whether by altering the road, or by placing suitable signs, or in an extreme case by closing the road...Those two requirements are in my opinion of great importance. The first means that roads authorities are entitled to act on the assumption that drivers and others who use the roads proceed with reasonable skill and care. That means that it can be assumed that drivers will have regard to any obvious dangers on the road and drive accordingly. There is no obligation on a roads authority to protect drivers from anything that is obvious. Obvious dangers would include bends, blind summits, visible road junctions, and the fact that the driver's view is restricted, whether by buildings, vegetation or features of the land and the configuration of the road. In all such cases, a careful driver should slow down and look carefully ahead. If he does not do so, the accident is his own fault...The second feature means that the hazard must be apparent to a competent roads engineer..."

Having stated the law in those terms, Lord Drummond Young opined that the law strikes a fair balance between the interests of drivers and their passengers on the one hand and the interests of roads authorities on the other hand. His Lordship continued (at para.65):

"Roads authorities are under a public law duty to maintain the roads under their care, and it seems fair that they should be held to minimum standards not just in public law but as a matter of delictual liability in civil law. Eliminating hazards, in the sense discussed above, is the minimum that can be expected of them. The fundamental fairness of such a duty is supported by consideration of the insurance implications of an accident. Third party motor insurance is of course compulsory, and if an accident is caused by a driver's fault those who are injured, including his passengers, may expect to obtain recovery from his insurer. If the driver is not at fault, however, there can be no recovery, from the insurer or the driver. If an accident occurs because of a hazard, in the sense discussed above, the critical point is that there is no fault on the part of the driver; it is the road that is dangerous rather than the driver. In such a case, therefore, passengers will only recover anything if the roads authority is liable... Furthermore, for a roads authority that deals conscientiously with its responsibilities, the cost of eliminating hazards will be part of its normal running expenses. In such a case, therefore, the duty of care imposed by Scots law should not add to the costs of the authority. To the extent that claims do occur, the cost can obviously be absorbed by insurance by the roads authority. The critical point is that the costs of such liability should not impose a serious burden on a roads authority, and will be almost non-existent for an authority that takes proper steps to eliminate hazards."

The respondent in *MacDonald* had argued that a roads authority should not be under any duty of care to road users. It was submitted that the Scottish case law (which holds that roads authorities are under such a duty) should not be followed. Instead, it was argued that the court should follow English case law which holds that no such duty exists at common law and road users should take the highway as found. The court in *MacDonald* rejected that submission. Lord Drummond Young asserted that this area of Scots law operates rationally and stated (at para.73):

"Much of the discussion in the English case law is based on the assumption that roads authorities must either be liable in all cases where loss is caused by defects in a road or in none of those cases. Scots law, however, takes an intermediate position: roads authorities are liable for negligence, but only in

respect of hazards, in the sense of defects that are unlikely to be noticed by road users who exercise reasonable care and skill. This provides redress in cases that are not covered by the compulsory system of motor insurance; thus there is an economic justification for the Scottish position. Furthermore, the cost of eliminating hazards should not be a significant burden for a roads authority that takes its responsibilities seriously. Most of the cases where doubts have been raised about the stance taken by Scots law have related to snow and ice, but these can readily be eliminated by considering the true rule of Scots law, which denies a remedy in nearly all such cases. Consequently I can see no reason for Scots law to follow English cases in this area. In the English cases, however, certain general points are made about the law of negligence, and it is appropriate to examine them in order to discover whether Scots law reflects the policy considerations that have underlain the English decisions.”

Lord Drummond Young took the view that the Scottish rule that a roads authority might incur liability to road users in negligence was fair and reasonable, applying the approach in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. He stated (at para.75):

“The roads authority is responsible in public law for the maintenance of the roads in its area, and it does not seem unfair or unreasonable that it should take proper steps to eliminate hazards that could not reasonably be foreseen by a careful driver, with civil liability if it fails to fulfil such a duty. This should not be especially onerous; an authority that takes its public responsibilities seriously should deal with such hazards as a matter of course. To the extent that a risk of civil liability remains, it can readily be covered by insurance. Moreover, in a case where a passenger is injured as a result of such a hazard, he or she will be denied redress if there is no liability on the part of the roads authority, but may well obtain redress under the existing rules of Scots law.”

Having reviewed these authorities and returning to *Bowes*, Lord Mulholland observed that the defender’s argument was similar to that which had been rejected in *MacDonald*. The Inner House decision in *MacDonald* was of course binding upon the Lord Ordinary.

Although the defender in *Bowes* argued that the defective parapet was not a hazard, Lord Mulholland disagreed. In *MacDonald* a hazard had been described as the sort of danger that would create a significant risk of an accident. In the instant case, the parapet was defective and its containment capacity was unknown. It posed a danger to road users and there was a significant risk of an accident caused by it.

The defender in *Bowes* argued that a parapet was not designed for careful road users, but for drivers who were at fault. Again, Lord Mulholland disagreed. While a parapet may come to the aid of drivers at fault it could also aid drivers who were not at fault such as those who have had a heart attack and lost consciousness, or who have been shunted from behind into the parapet. Mr Bowes, having lost control of his vehicle, was entitled to rely on the parapet to prevent serious injury or loss of life. Had the parapet been functioning as designed, Mr Bowes’ truck would not have left the bridge and he would not have drowned.

Lord Mulholland then alighted upon the issue of whether the authority was at fault in failing to deal with the hazard (of which it had knowledge from 2005) prior to the accident. In this connection, Lord Mulholland applied the test set out by Lord

Drummond Young in *MacDonald*, namely whether a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to rectify it. The defender had been placed on notice that the parapet was defective to the extent that its containment capacity was unknown as at the date of the accident. Mr Christie had categorised the defects as severe and recommended that they should be rectified within the next financial year and that biannual inspections should be carried out to monitor deterioration, until the parapet was replaced. When the accident occurred, the parapet had not been replaced and monitoring had been discontinued.

Lord Mulholland observed (at para.31):

“The hazard had not been dealt with and the risks that it posed had not been mitigated. Had the twice yearly inspections continued then the defender would have been in an informed position to consider, going forward, what steps should be taken to deal with the hazard. The stopping of the inspections meant that the defective parapet and the risk that it posed did not receive the ongoing consideration that it deserved. No risk assessment was carried out prior to the accident. The parapet would eventually be replaced however long it took. It was replaced in 2011, 6 years after Mr Christie had recommended that it should be replaced in the next financial year. The defender’s approach was to hope for the best and leave it to chance.”

His Lordship observed that Mr Christie’s view was that interim measures should be put in place but that proposal had been rejected by Mr Louttit, his boss. The implementation of interim measures also seemed to be under contemplation by the co-author of the Faber Maunsell report although there was no evidence that this had been followed up.

Ian Hunt, a Chartered Civil Engineer, gave evidence that, as far as the defects in the parapet were concerned, there would almost certainly be more cracks than were visible and he would have expected the defender to be alert to that possibility. He regarded roads authorities as having a fundamental duty to protect the public and took the view that the travelling public should have been made aware of the weak parapet. Having regard to the condition of the bridge parapets in 2005, reiterated in 2008, he was astonished that nothing had been done to address the position. On receipt of the 2005 Principal Inspection report he would have expected the responsible bridge management team to have met and considered the implications of a “reportedly weak parapet on the safety of the travelling public.” Following the 2008 Faber Maunsell report it should have been clear to the roads authority that immediate measures were needed to protect the travelling public. Mr Hunt took the view that several risk reduction strategies should have been taken. His preferred option would have been to impose a 30 mph speed restriction together with signage advising of the reason for the speed limit (this could require formal permission). This would have cost a few hundred pounds as he would have expected any roads authority to have the necessary equipment available in its maintenance yard. Temporary barriers in front of the existing parapets should have been erected. The defender already had a stock of temporary barriers which could have been utilised or the barriers could have been rented or purchased. Mr Hunt had obtained an estimate of £50,000 for 400 metres from a supplier of plastic barriers (which would be a capital asset). Mr Day, the defender’s expert, disagreed, as did Mr Mackenzie, Mr Louttit and Mr Moncrieff. Their view was that it was reasonable to have taken no

steps to deal with the defective parapet until it was replaced, having regard to the absence of an accident history, the low volume of traffic, the configuration of the road, namely long and straight, the non observance of a reduced speed limit, the possibility of traffic queues, the risk of overtaking, the *ex post facto* risk assessment which resulted in monitoring only, and the cost of interim measures and replacement having regard to the limited budget of the defender. Lord Mulholland was unpersuaded by the defender's argument. In his view (expressed at para.32) "[t]here was a pressing need to address this hazard." He went on to observe that the council took six years to do so from being placed on notice of the problem.

Although inconvenient for road users, Lord Mulholland observed that a speed reduction and single lane carriage were not unduly onerous. Indeed, there were many speed restrictions for safety reasons in place in Scotland. It was also noteworthy that, when the bridgework was carried out and the parapet replaced, a temporary speed limit of 30 mph, a single lane carriageway and temporary barriers were in place for approximately 8 months and no evidence was adduced of any actual difficulties which resulted. These measures were similar to those which the court in *Sargent* held would have prevented or reduced the possibility of the accident there. Lord Mulholland observed that the interim measures were reasonably practicable and the cost was modest. The view of Mr Christie, who had proposed those measures in 2005, was endorsed by Mr Hunt and supported by the Faber Maunsell report in 2008. The reason for not adopting these interim measures prior to the accident was undermined by their adoption during the bridge works in 2011 when the parapet was replaced. They would have warned road users of the risk presented by the hazard and would have resulted in them taking care by reducing speed and driving to the temporary lights on a single carriageway. The temporary barriers and other interim measures would have reduced speeds such that Mr Bowes would probably not have left the bridge to his death in February 2010. The possibility of this kind of accident was foreseeable. While Lord Mulholland accepted that there was no accident history on the bridge, the parapets were erected in order to prevent the type of accident which did in fact occur in this case.

Lord Mulholland concluded (at para.33):

"The fact that the parapet was erected and then scheduled for replacement when it deteriorated is a recognition of a need generated by the foreseeability that an accident on this bridge was more than a remote possibility. The fact that it did happen is proof indeed that parapets working as intended are required. I therefore find it proved that the defender breached its duty to deal with the hazard, namely the defective parapets, by implementing interim measures until the parapets were replaced. To do so would have prevented the death of the deceased."

A final point should be made about the defence of contributory negligence upon which the defender sought to rely. The defence operates where the pursuer is partly to blame for his own loss or injury. The defence is now governed by statute in the shape of the Law Reform (Contributory Negligence) Act 1945. Section 1(1) of the Act provides:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons...the damages recoverable ...shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."



Section 4 of the Act provides that “*damage*” includes loss of life and personal injury. The damage suffered in this case was clearly the loss of Mr Bowes’ life. It will be remembered that the Lord Ordinary concluded that the deceased had been at fault in losing control of his vehicle. However, had the parapet behaved as it ought to have done, Mr Bowes’ life would not have been lost. Indeed, he would only have sustained minor injuries or none at all. Accordingly, Lord Mulholland did not regard Mr Bowes’ negligent driving as having contributed in any significant way to causing the harm complained of. As there was no basis for any finding of contributory negligence, Lord Mulholland refused to make any deduction in the award.

### **Conclusion**

Although injuries sustained on the roads often result from collisions between vehicles, some injuries (fatal or otherwise) result from hazards on the roadway itself. *Bowes* is an important decision in that it reaffirms the requirements for the imposition of liability in such cases, such requirements having been previously set out in the Inner House judgment in *MacDonald*. First, the injury must be caused by a hazard i.e. the sort of danger which would create a significant risk of an accident to a careful road user. In addition, the authority must be at fault in failing to deal with the hazard. Both of these requirements were met in *Bowes*: the weakened parapet constituted a hazard and by the date of the accident, a reasonable authority would have implemented interim measures pending its replacement. This case certainly sounds a cautionary note and is one of which all roads authorities in Scotland should take heed.